Supreme Court, U. S.
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IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1977

No. 77-282

FRERES LUMBER COMPANY, INC.,
FRERES VENEER COMPANY, and
ROBERT T. FRERES, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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FRERES LUMBER COMPANY, INC.,
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UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners request a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 3, 1977, and amended by order of July 20, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported. It is printed in the appendix to this petition as Appendix A.

The opinion of the United States District Court for the District of Oregon was not reported. The opinion is printed in the appendix to this petition as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 3, 1977. A timely petition for rehearing was filed, and the petition for rehearing was denied by order dated July 20, 1977. A copy of the order denying the petition and amending the opinion is attached as Appendix C to this petition. The

jurisdiction of this court to grant certiorari is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. In a criminal case under the Sherman Act, in which defendants are accused of illegally conspiring on the submission of bids for the purchase of public timber at oral auction sales, can a criminal agreement be inferred beyond a reasonable doubt from statistical evidence which is equally consistent with a finding of innocence as with a finding of guilt?

2. Does federal court jurisdiction under the Sherman Act extend to transactions involving bidding at oral auctions for the contractual right to harvest standing timber?

STATUTE INVOLVED

The statute under which the indictment was brought is section 1 of the Sherman Act (15 USC § 1), which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall

> not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

An indictment was returned by a grand jury in 1974, charging these defendants and other corporations and individuals with violating section 1 of the Sherman Act by a combination and conspiracy to (1) eliminate competitive bidding for Forest Service timber; (2) allocate the timber among defendants; (3) fix, reduce, and stabilize the price

paid near the minimum acceptable bid set by the Forest Service; and (4) bid up any nonconspirator who attempted to bid on timber.

The government's response to a bill of particulars alleged a single conspiracy joined in by all defendants, beginning in June, 1967, and continuing to the date of the indictment.

All defendants entered pleas of not guilty.

The case was tried to the court sitting without a jury. On motion at the end of the government's case, the court acquitted defendant L. James Bagley, an officer of defendant Champion International Corporation, and, on separate motion, acquitted defendants Frank Lumber Company, Inc., and A. J. Frank, an officer of defendant Frank Lumber Company, Inc. The motions of the other defendants were denied.

The thrust of the government's case was that an agreement had been reached among defendant mill operators to bring an end to a "bidding war" in the North Santiam drainage of Western Oregon in June, 1967. The trial court rejected that contention, finding that there was no evidence of any agreement to bring an end to the 1967 "bidding war." Furthermore, the trial court expressly found: that the bidding pattern after the end of the bidding war was caused by normal economic forces and was not the result of any conspiracy; that, in this small, isolated area of Western Oregon, all the mill operators usually knew which timber sales would likely be of particular interest to other operators (because of location of plants, other logging activities, or because of the specie mix); that it frequently became apparent that one prospective bidder had a built-in economic

advantage over the others, and mill operators knew the bidder with an economic advantage could afford to bid more; and that, if a mill operator who did not have an economic advantage outbid the mill operator who logically did have the economic advantage, there would likely be retaliation with high bids on a later sale where the other party had the natural economic advantage. The trial court also made the pertinent finding that the government had failed to prove that bidding up of "outsiders" was a part of any combination or conspiracy.

The trial court found (as defendants had frankly admitted in their pretrial briefs) that the defendants had met on four or five occasions over a four-year period and, at such meetings, one of the incidental topics discussed was the scheduled Forest Service timber sale program for the area. The court

found that such meetings between competitors are not illegal, even when coupled with individual comments about each participant's potential interest in a future timber sale.

Despite making those factual findings, the court concluded that a line should be drawn between exchange of interest and an "implied" agreement to act on information, and that defendants crossed that line. The court's legal conclusion of guilt was based upon evidence of the several meetings coupled with evidence that, in several instances where specific sales had been mentioned, certain sales later were sold to one of the defendants at or near the government appraised price without substantial bidding opposition from one or more of the other defendants. From this evidence, the trial court inferred a "tacit

agreement"--with which inference the appellate court concurred.

However, each individual who attended the meetings specifically denied under oath that his company had ever directly or indirectly agreed to bid or not to bid on any prospective government timber sale, and specifically affirmed that his company never surrendered its right to make a unilateral decision as to whether to bid at such oral auction sale, or as to the amount of such bid (Tr. 187, 201, 202, 205).

Furthermore, the expert witness called on behalf of defendants testified that the "bidding war" came to an end in 1967 as a result of natural economic forces, that the statistics showing lack of substantial "upbidding" among defendants during the 1968-1972 period were explained by the fact that, in this small geographic area, each mill operator knew

the needs and natural economic advantages of the other, and, further, that the 1968-1972 period was one of a national economic depression in end-product prices, thereby inhibiting optimism in the submission of bids. According to this witness, natural economic conditions in this time period inevitably resulted in the bidding pattern relied upon by the government to show guilt. He concluded that the lack of strong competitive bidding in the 1968-1972 period was explainable by the economic conditions of this period.

In spite of the direct evidence that there was no contract, combination, conspiracy, or even any "understanding" among defendants on bidding on any Forest Service sale, and the expert opinion evidence that natural economic forces caused the lack of substantial bidding competition among defendants during the

1968-1972 period, the trial court found the remaining defendants guilty of criminal violation of the Sherman Act.

REASONS FOR GRANTING WRIT

This case presents serious and fundamental questions affecting the business community of America, and the timber industry in particular, in that it involves the standards of proof which are to be applied to the business community in determining whether a business is guilty of criminally violating the federal antitrust laws.

Specifically, a principal fundamental question posed by the trial and appellate court decisions in this case is whether a business can be found guilty of criminally violating the anti-trust laws in the submission of bids for the purchase of government property when the evidence is wholly circumstantial,

and is equally consistent with a finding of innocence as with a finding of guilt.

Such question in turn raises the following issues:

1. In a criminal antitrust case, is there to be a lower standard of proof than is required in other criminal cases?

2. Is the rejected doctrine of "conscious parallelism," or of "constructive conspiracy," to be reinstated as the basis for finding American businessmen guilty of violating federal antitrust laws?

A second and equally fundamental reason why this court should grant certiorari is to determine whether there are to be any limits on the jurisdiction of a federal court under the federal antitrust laws when the resource involved in the allegedly criminal transaction--

timber in this case--is an integral part of real property.

These two reasons for granting a writ are discussed in greater depth as follows:

A. The decision below is in conflict with controlling decisions of this court and of other circuits with respect to the standard of proof in a criminal antitrust case.

Notwithstanding the findings of fact which exonerated defendants from the thrust of the government's case as set forth in the indictment and particularized in the bill of particulars (namely, that the defendants conspired in order to end the 1967 "bidding war"), the trial court found certain defendants guilty of a constructive conspiracy beginning in 1968 and continuing to 1972.

The trial court based its conclusion on statistical evidence that

there was no substantial "upbidding" for a period of three years after the "bidding war" came to an end from natural economic causes.

The Court of Appeals affirmed. In so doing, the opinion of the Court of Appeals failed to decide the issue raised on appeal; that is, in a criminal case, where the evidence is wholly circumstantial (statistical bidding patterns), and a conclusion of innocent conduct is as consistent as is a hypothesis of guilt, has the government sustained its burden of proving guilt "beyond a reasonable doubt"?

The court below acted contrary to the long-established rule that, in a criminal prosecution, in order to warrant conviction, the prosecution is required to establish beyond a reasonable doubt all the essential elements of the crime with which the defendant is charged in

the indictment. Potter v. United States, 155 US 438 (1894).

In recent years, some federal trial courts have employed a lower standard of proof in criminal cases brought under the antitrust statutes, simply because violations were termed "misdemeanors." The lower courts have not accorded antitrust defendants the same protection as they have persons charged with criminal violations of other statutes. At least one federal court has so stated.

United States v. Nu-Phonics, Inc., Trade Reg Rep ¶ 61,523, pp. 72,046-50 (ED Mich June 20, 1977)

> "Mindful of this drastic increase in penalty and in the collateral consequences of conviction (e.g., felony convictions often prevent licensing, while misdemeanor convictions do not), the court, in responding to the government's motion in limine, has attempted not only to apply the law as it has been developed over more than 75 years during which violation of the act was only a misdemeanor, but also has made an effort to begin the

process of making certain that persons charged with a felony antitrust violation are given the same protections as persons charged with more traditional felonies.

* * *

"On the other hand, the existence of price uniformity among competitors, is not, in itself, sufficient evidence of price-fixing. * * * Nor have the courts recognized a concept of 'constructive price-fixing,' in instances where increased price or price stabilization is a natural and probable consequence of cooperative action among competitors which is unrelated to price. * * *

* * *

"In every criminal price-fixing case, the government must prove: (1) that there was a conspiracy; (2) that its purpose was to fix or stabilize prices; and (3) that it had 'the effect of raising, depressing, fixing, pegging or stabilizing' prices. See Socony-Vacuum, supra, 310 U. S. at 219-20, 223.

* * *

"On the other hand, agreements which merely create the potential power for price maintenance must be shown to be price-fixing agreements. See United

States v. Container Corp. of America [1969 Trade Cases ¶ 72,675], 393 U. S. 333 (1969). The anti-competitive purpose of such an agreement is not apparent, and therefore it must be proved. It must be shown that the defendants joined together for the purpose of fixing prices. If this requirement were not preserved, business people would be guilty of price-fixing whenever any of their concerted action has the natural and probable consequence of causing increased, decreased, or stabilized prices. Such a theory of 'constructive price-fixing' was rejected before violation of the Sherman Act became a felony. * * * Surely, it must be rejected now that a violation of the Act is a felony. * * * I" (emphasis added)

"1 Footnoted material referred to on page 16 of the Memorandum and Order.

"The distinction being urged here between the burden of proving civil and criminal violations of section 1 of the Sherman Act is well illustrated by United States v. Container Corp. of America, Inc., supra. In that case, a civil proceeding, an informal tacit agreement among competitors to exchange price information on their charges to specific customers was held to be price-fixing. This holding was based on the economic effects of the arrangement--viz., the stabilization of market prices. In other

In the instant case, the trial court and Court of Appeals mistakenly followed the theory in the civil antitrust case of United States v. Container Corp. of America, Inc., 393 US 333 (1969), in holding that "otherwise neutral activities became an unlawful price-fixing scheme because of their economic effects." The rule requiring proof beyond a reasonable doubt applies to all crimes, regardless of their character or degree of the

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([1] cont'd) words, otherwise neutral activities became an unlawful price-fixing scheme because of their economic effects. Evidence in the record indicated that the defendants actually may have exchanged price information so that they could undercut each other. If in fact the defendants were exchanging price information in order to undercut the competition, then clearly they did not have a specific intent to fix prices, and they should not be subject to felony penalties. Had Container Corp. been a criminal proceeding brought after the 1974 amendment, this evidence should have been admitted as weighing against any inferences of anticompetitive intent which could be drawn from the foreseeability of price stabilization." (emphasis added)

crime. However appealing the thought that more evidence should be required to convict of a "serious" crime than of a "trivial" crime, it has no place in the law. The rule in all criminal prosecutions is that proof beyond a reasonable doubt is required. Argersinger v. Hamlin, 407 US 25 (1972).

In a criminal prosecution under the antitrust acts, whether for misdemeanor or felony, the presumption of innocence must be overcome by evidence strong enough to show beyond a reasonable doubt that the defendants did the illegal acts charged. Consequently, circumstantial evidence is not sufficient to establish a conclusion of guilt where the circumstances are merely consistent with that conclusion, or where they give support to inconsistent conclusions. There must be substantial evidence which tends to disprove innocence. Unless

these inferences and presumptions are dispelled, it is the duty of the court to acquit.

Pevely Dairy Co. v. United States, 178 F2d 363, 370 (8th Cir 1949), cert denied, 339 US 942 (1950)

See also

United States v. Chas. Pfizer & Co., 426 F2d 32, 40-41 (2nd Cir 1970), modified and petition for rehearing denied, 437 F2d 957 (2nd Cir 1970), aff'd, 404 US 1011 (1972), where a jury finding of guilt was reversed.

On remand, the Pfizer case was tried to the court sitting without a jury. The trial court, using the proper burden of proof, entered an acquittal.

United States v. Chas. Pfizer & Co., Inc., 367 F Supp 91, 100 (SD NY 1973)

Under the Sherman Act, in order to sustain a conviction, the prosecution should be required to prove that a combination or agreement was entered into in terms of a real "meeting of the minds."

Neale, The Antitrust Laws of the United States of America (1962)

> "If businessmen are fully informed of all the factors in the market situation, may it not happen that they independently and quite rationally refrain from cutting each other's throats, so that an absence of price-competition is explained without postulating agreement or conspiracy? How is this situation, which is beyond the reach of the law, to be distinguished from that which arises from illegal agreement?
>
> * * *
>
> " * * * [I]t is clear on the other hand that antitrust knows no doctrine of 'constructive conspiracy'; that is to say, the existence of a restrictive agreement cannot be proved simply by showing that the effects usually associated with such an agreement have occurred. It is not enough to show that prices have been uniform and unchanged or that no new entrants have appeared in an industry for ten years and invite the court to jump directly to a conclusion of conspiracy. The most ardent trustbuster would in turn accept this as settled law." (pp. 81-83; emphasis added)
>
> "The law now seems pretty clear on this topic. A genuine 'meeting of the minds' is still

> required for conspiracy. Moreover, in the last resort, it is still for the prosecutor or plaintiff to prove: a burden rests on the defense only in the sense that the best way of defending oneself against circumstantial evidence is always to produce a plausible alternative explanation of the facts. Parallel courses of action on the part of powerful firms have no substantive significance in law: they are significant only as evidence, which may be more or less powerful according to circumstances, of a common understanding." (p. 91; emphasis added)

Nor is evidence of parallel conduct of businessmen sufficient to sustain a criminal charge of conspiracy.

This court has so held. Theatre Enterprises v. Paramount Distrib., 346 US 537 (1954); see also Independent Iron Wks., Inc. v. United States Steel Corp., 177 F Supp 743 (ND Cal 1959), aff'd, 322 F2d 656 (9th Cir 1963).

Even an exchange of price information where there is no obligation to make such exchange or to act thereon

is not unlawful under the Sherman Act. Maple Flooring Mfrs. Asso. v. United States, 268 US 563 (1925); Cement Mfrs. Protective Asso. v. United States, 268 US 588 (1925); American Column & Lumber Co. v. United States, 257 US 377 (1921).

In the instant case, the fact that bidding patterns remained stable for several years, or that there were unilateral statements of "interest" not amounting to express agreement, is not sufficient to establish conspiracy or agreement in violation of the antitrust laws, where it is not shown that defendants did anything in apparent contradiction to their own self-interests. United States v. Borden Co., 111 F Supp 562, 579 (ND Ill 1953), aff'd on Sherman Act issue, modified on other issue, 347 US 514 (statistical evidence in bidding case demonstrated nothing more than a disposition on the part of certain defendants to

bid for the milk requirements of particular institutions); Pevely Dairy Co. v. United States, 178 F2d 363 (8th Cir 1949)(conviction reversed, despite evidence of uniform prices on product defendants sold, past conversations, and proximate price changes); United States v. Chas. Pfizer & Co., Inc., 367 F Supp 91 (1973); State of North Carolina v. Chas. Pfizer & Co., Inc., 384 F Supp 265 (ED NC 1974), aff'd, 537 F2d 67.

After United States v. Borden Co., supra, the rule should have been resolved that mere statistical evidence in a bidding case, demonstrating nothing more than a disposition to bid on certain offerings and not others, is not sufficient to establish conspiracy, particularly in a criminal case. In short, "constructive conspiracy" or agreement implied from statistics or economic circumstances, or patterns of similar or

parallel conduct, is not sufficient evidence to show guilt beyond a reasonable doubt in a criminal case.

The decision in the instant case is in conflict with the decisions of this court on the subject of "conscious parallelism," or "constructive conspiracy," and in conflict with other circuits and prior decisions in the same circuit. Certiorari should be allowed to clarify the rule that guilt must be established beyond a reasonable doubt in all criminal cases, particularly in view of increased emphasis on criminal prosecutions under the antitrust acts.

B. The "in-commerce" theory of federal court jurisdiction should not be extended to transactions involving bidding on the purchase of real estate, or any integral part of such real estate.

These petitioners agree with and adopt the reasoning advanced by

petitioners Young and Morgan, Inc., Bugaboo Timber Company, and Vernon R. Morgan in their petition for certiorari to this court, filed concurrently with this petition.

In particular, these petitioners point out that no interstate commerce could be involved with respect to the transactions as to which petitioners are accused of conspiring; that is, alleged conspiracy with respect to bidding on future sales of standing timber. As a result of bidding on such sale, the successful bidder received nothing more than a contract right to sever and remove timber which was then standing. The standing timber was part of the realty, and not goods subject to interstate commerce. Even the Uniform Commercial Code denominates minerals or timber, which are to be removed or severed by the buyer (as opposed to the seller), as part

of real property, and not "goods." See UCC § 2-105 and comment 4 thereto.

CONCLUSION

For the reasons set forth above, petitioners respectfully request this court to grant its writ of certiorari.

Respectfully submitted,

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APPENDIX A

AMENDED: July 20, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
CHAMPION INTERNATIONAL CORPORATION, Appellant.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 75-2866
YOUNG & MORGAN, INC.,	)	No. 75-2367
BUGABOO TIMBER COMPANY,	)	No. 75-2873
et al., Appellant,	)	OPINION
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
FRERES LUMBER COMPANY, INC., FRERES VENEER COMPANY and ROBERT T. FRERES, Appellants.	)	

Appeal from the United States District Court
for the District of Oregon

Before: GOODWIN and SNEED, Circuit Judges,
and POOLE,* District Judge.

May 3, 1977

* The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

GOODWIN, Circuit Judge:

Seven corporate and individual defendants appeal their respective convictions of criminal violations of 15 U.S.C. § 1, under indictments charging a conspiracy to eliminate competition in the bidding for timber offered for sale by the United States Forest Service.

The defendants were engaged in the lumber and plywood business in or near the Detroit Ranger District. The Detroit Ranger District is an administrative division of the Forest Service in Oregon lying between the central Willamette Valley and the summit of the Cascades.

After determining the allowable harvest and other factors relevant to the federal timber management program, the district ranger offers for sale at public auction the various tracts of timber scheduled for cutting. Lumber and plywood manufacturers receive announcements sufficiently in advance of each sale so that, as potential buyers, they may decide whether and how much to bid. They evaluate the quality, quantity, and location of the timber, the difficulty of logging, hauling distances, road-building requirements, climate and weather conditions, and other factors that may or may not make a particular sale attractive.

All the relevant sale information was made public. But the defendant operators were located in or near the Detroit district and were in a position to supplement public announcements with their own knowledge of the timber and terrain. More important to bidding, they knew the production capacities and

product mixes of their own and neighboring plants. It was the government's theory that the defendants illegally exchanged information, based upon their special knowledge, to restrict bidding. During the period covered by the indictment, the defendants purchased about 90 percent of the sales made by the district.

The defendants were convicted of engaging in a combination and conspiracy in restraint of trade. The specific charges were that they entered into a continuing agreement, understanding and concert of action: "(1) to eliminate competitive bidding for United States Forest Service timber; (2) to allocate United States Forest Service timber among themselves; (3) to fix, reduce, and stabilize the price paid for United States Forest Service timber at or near the minimum acceptable bid set by the United States Forest Service, and (4) to bid up any non-conspirator who attempted to bid on United States Forest Service timber." After a trial without a jury, the court found the appellants guilty of the first three specifications.

The appellants, challenging the court's findings, point to the undisputed economic and geographic factors relevant to any bidding on timber by the local operators, and argue that there was no conspiracy—just the exercise of ordinary common sense by individual bidders who saw no reason to throw their money away, and we were under no legal duty to do so.

The government argues that no mater how self-evident the economies of their bidding conduct may

have been, independent pursuit of self interest could not overcome the inference of collusion which is almost compelled by the methodical manner in which the defendants took turns acquiring without substantial competition most of the various cutting contracts offered by the Forest Service during the period covered by the indictment.

A. SUFFICIENCY OF EVIDENCE

The district judge, in his written findings, took note of the bidding practices that had prevailed in the region prior to the time covered by the indictment, and observed that the earlier period was marked by intensely competitive bidding, sometimes bringing into government coffers prices three times the appraised value of the timber offered in the auctions. (Trial witnesses had characterized this period as one of a "bidding war.")

Prior to 1967, high demand for the various species of timber offered for sale kept local bidding competition at a generally high level. This "bidding war" came to a sudden end on June 2, 1967, when defendant Vernon Morgan "was surprised" to find no one bidding against him at an auction of a small offering of government timber. Morgan decided, he said, "to experiment," and later that same day he offered no bid against defendant Freres on another sale, with the result that Freres took the second sale at a nominal figure over the appraised price.

The trial court agreed with the defendants that a new bidding pattern had thus developed by "normal economic forces," presumably in a noncollusive evolu-

tion, and it "delighted" the bidders. The court went on to note that for the next two or three logging seasons the defendants were able to buy most of the sales they wanted at prices approximating the government's appraised prices. (If a sale did not bring at least the appraised price, the government would cancel the sale.) But desite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation.

There was evidence that managers or agents of the various defendant entities began meeting from time to time to review the government's forecasts of upcoming sales. At these meetings the operators discussed among themselves which of the sales would be most interesting to each respective bidder. The defendants have always asserted that these meetings were innocent, but the court found otherwise.

In a general way, the extent of an individual operator's interest in a future sale could have been predicted by anyone familiar with the operator's hauling distances, his product mix, his manufacturing capacity, and the other factors that determine a sale's relative desirability to that operator. However, the defendants did not leave the exchange of this information to chance. During the time covered by the indictment the defendants advised each other about the future sales upon which they were most likely to bid. Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants "had an understanding" about bidding.

[1] The government was unable to introduce direct evidence of an express agreement, but argues that the circumstantial evidence proved the existence of the tatcit agreement found by the judge. We agree.

The trial judge was not convinced beyond a reasonable doubt that the defendants were guilty of "bidding up" outsiders with the requisite illegal purpose. But this failure of proof does not undermine the ultimate finding of a violation of the Sherman Act as charged in the other specifications of the indictment.

B. INTERSTATE COMMERCE

[2-4] Even if activities alleged to be illegal are wholly intrastate, the requisite jurisdiction under the Sherman Act can be found if the activities substantially affected interstate commerce. *Teamsters Local 167* v. *United States*, 291 U.S. 293, 54 S. Ct. 396, 78 L. Ed. 804 (1934). From evidence produced at trial, the judge found that the charged conspiracy had a substantial effect on interstate commerce. The substantiality of the effect of a restraint on interstate commerce must be measured by the substantiality of the interstate commerce which is touched by the restraint, and not by competitive impact of the restraint. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). There was no error in finding the necessary effect upon commerce.

C. SPECIFIC INTENT

[5] Champion argues that in "specific intent cases" it must be shown that the conspiracy was knowingly formed, and that the defendant willfully participated in the unlawful plan. However, under the Sherman Act no specific intent need be shown. As the Supreme Court stated in *United States* v. *Masonite Corp.*, 316 U.S. 265, 62 S. Ct. 1070, 86 L. Ed. 1461 (1942):

> "* * * And as respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they 'must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary.' *United States* v. *Patten*, 226 U.S. 525, 543, 33 S. Ct. 141, 145, 57 L. Ed. 333 * * *." 316 U.S. at 275, 62 S. Ct. at 1684.

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962), this court held that in a Sherman Act case, it is "not necessary to find a specific intent to restrain trade or eliminate a competitor * * *." 284 F.2d at 26.

D. USE OF GRAND JURY TRANSCRIPT

[6, 7] Defendant Freres contends that the district court erred in permitting the government to read portions of a grand jury transcript during trial. Prior

inconsistent testimony of a witness before a grand jury is admissible as substantive evidence if the same witness testifies at the trial. Fed. R. Evid. 801(d)(1)(A). The portions read were admissible under the cited rule, even though some of the grand jury testimony had been elicited by means of leading questions. There was no error.

The judgments are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
v.	)	
CHAMPION INTERNATIONAL	)	
CORPORATION, YOUNG AND	)	
MORGAN, INC., BUGABOO	)	
LUMBER COMPANY, INC.,	)	CR No.
FRERES VENEER COMPANY,	)	74-698
FRANK LUMBER COMPANY, INC.,	)	OPINION
L. JAMES BAGLEY, VERNON R.	)	
MORGAN, ROBERT T. FRERES,	)	
and A. J. FRANK,	)	
Defendants.	)	

On Appeal from the United States District Court
for the District of Oregon

BELLONI, Judge:

This case was tried to the court beginning on June 9 and ending on June 24, 1975.

The indictment charges the defendants with violating Section I of the Sherman Act (15 U.S.C. § 1) by engaging in a combination or conspiracy: to eliminate competition for United States Forest Service timber in the Detroit Ranger District of the Willamette National Forest; to fix, reduce and stabilize the price paid for such timber; to allocate such timber among themselves; and, to bid up any non-conspirators who attempted to obtain such timber.

At the conclusion of the government's case I grant-

ed Motions for Judgment of Acquittal in favor of defendants Frank Lumber Company, A. J. Frank and L. James Bagley. The remaining defendants are Champion International Corporation; Young and Morgan Inc., its affiliate, Bugaboo Timber Co. and Vernon R. Morgan, the general manager of both; and, Freres Lumber Co., Freres Veneer Co. and their agent, Robert Freres. Each of the corporate defendants purchased U. S. Forest Service timber sales during the relevant period.

The Detroit Ranger District[1] is located in the northeastern corner of the Willamette National Forest. Its eastern border runs along the summit of the Cascade Mountain range. There are three timber communities located in the district. They are, from west to east: Lyons, Mill City and Idahna. This district is predominantly a Douglas Fir region. Young and Morgan has mills located at Mill City and Idahna. Freres has mills at Lyons and Idahna. Champion has a mill at Idahna.

The government's theory is that these defendants, in a series of meetings and in personal discussions, set up a system to eliminate competitive bidding among themselves so they could buy U. S. Forest Service timber at bargain prices. Also and as a part of the conspiracy, the government contends that the defendants agreed to bid up any other competition to eliminate competition.

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[1] In 1968, the Detroit and Mill City Ranger Districts were merged into what is now known as the Detroit Ranger District.

The defendant's theory is that the bidding pattern from mid-1967 to late 1972 was a natural and expected result of observable supply-demand forces; including Simpson Lumber Company's withdrawal from the area,[2] the timber quality and specie mix used by the various defendants and the geography of the North Santiam canyon itself. It is a small canyon and the defendants contend that the local mill capacity and log supply were in balance.

I find that the facts sustain some of the contentions put forth by each side.

I find, from the evidence in this case and beyond a reasonable doubt, the following facts.

Between January 1964 and May 1967, extremely intensive bidding occurred in the Detroit Ranger District. The defendants called this a bidding war. Bids reached as high as three times the amount of the Forest Service appraised price for the timber.[3] There were three principal bidders involved: Simpson, Freres and Young and Morgan.

On June 2, 1967, the bidding was suddenly stopped. On that date, Vernon Morgan appeared as

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[2] Simpson Lumber Company is the predecessor of Champion in the North Santiam. In October 1968, Champion purchased mills at Lyons and Idahna and quantity of fee timber from Simpson. The mill at Lyons was closed and never reopened.

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[3] Very simply, the Forest Service appraised price is reached by the following calculations: The market value of the average end-products that will be produced from the timber *less* average logging and milling costs and a profit and risk margin.

usual to bid for a small sale and no one appeared to bid against him. This was a surprise to Morgan in view of the previous level of biding competition. The government's theory is that this was the beginning of the conspiracy and it presented opinion evidence that this could not have occurred without an agreement among the bidders. I disagree. No evidence of any agreement was presented and, from the evidence, I do not believe one had occurred.

Vernon Morgan then decided to experiment and see what would happen. Later in the same day, there was another sale in which Freres was interested. Morgan qualified[4] but did not bid and Freres bought it without opposition. A few days later, there was another sale which Morgan bought without opposition. Several days later, a sale occurred in which all bidders knew that Simpson was interested. Morgan and Freres laid off bidding and Simpson took the sale without opposition.

The bidders, of course, were delighted with this new bidding pattern because, being without opposition, they were able to purchase the timber sales at or near appraised value. The Forest Service will not accept a bid lower than its own appraised value but it will sell to the highest qualifying bidder who bids at or above appraisal.

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[4] A "qualified" bidder at a Forest Service oral auction is one who submits a sealed bid of at least the appraised price set by the Forest Service. The oral auction then begins with the bidder submitting the highest sealed bid being the high bidder. Only those "qualified" bidders may participate in the oral auction.

The bidding pattern, immediately following Morgan and Freres' first non-competitive bidding, was caused by normal economic forces and was not the result of any conspiracy. Bidding wars are often followed by a similar pattern. In this small area, the North Santiam canyon, all the operators usually knew which timber sales would most likely be of particular interest to each operator. Perhaps it was located next to one of the operator's plants or his other logging shows or it might be of the specie mix or quality mix that fits one mill better than another. In such a case, it frequently became apparent that one bidder had a built-in advantage over the others. Competitors knew that the bidder with the economic advantage could afford to pay more than the others and not cut into his profits. They also knew if one of them took a sale from the operator who would logically be the most interested in that sale he might retaliate with high bids on a later sale where that competitor had the economic advantage.

In March 1968, Freres called a meeting which was attended by Freres, Morgan and others. At this meeting, one of the topics was the upcoming Forest Service timber sales. Each participant told the others in which upcoming sale or sales his company was interested. Sometimes one of them would go into the reasons for this interest.

This "exchange of interest"[5] continued in each of

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[5] "Exchange of interest" was a phrase used throughuot this trial. In simple terms, it means that the operators would inform each other of the sales in which they were interested in buying.

the subsequent meetings. The defendants attended a second meeting in April or May of 1969 at Freres Lumber Co. A third meeting was called by Freres in the spring of 1970 at which all defendants were represented. The final meeting of the defendants was held in Albany, Oregon in the early fall of 1971.

Meetings between competitors are not illegal even when coupled with the exchange of information about each participant's interest in upcoming sales. A line must be drawn, however, between the mere exchange of interest and an implied agreement to act on this information. The defendants crossed that line. The following sales were discussed at these meetings.

1968 meeting at Freres:

Champion expressed interest in the four Eagle Rock sales. Champion later took all four sales: three of them at 1, 5 and 6 cent premiums.[6]

1969 meeting at Freres:

Champion expressed interest in the Tom Creek sales. Champion later took both sales at 5 and 90 cent premiums.

1971 meeting at Albany:

Champion, Young and Morgan and Freres each expressed interest in the Cub Point and Leone Hill sales. Champion took Leone Hill at a 10 cent premium. Young and Morgan took Cub Point at a 5 cent premium.

Skunk Creek and Box Canyon # 2 were also discussed. Young and Morgan took Skunk

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[6] A $.01 premium bid is a bid which is 1 cent per thousand board feet over the appraised price set by the Forest Service.

Creek at a 5 cent premium. Champion took Box Canyon # 2 at a 5 cent premium.

The meetings described above are only examples of the pattern of the defendants' conduct which continues throughout this period. This pattern shows that when only one party expressed interest in a particular sale, the others refrained from bidding against him when that sale occurred. In several instances, more than one party expressed interest in a sale but, when that sale occurred, all but one of the participants, although qualified to bid, did not do so. All of the sales listed above were sold at or near the appraised price without opposition. I find that the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves. At the conclusion of each of the meetings described above, for example, it was understood that the most interested buyer would purchase the sale. No one really committed himself not to bid but in sale after sale over a four year period, the one who had expressed the highest interest in a sale was the one who took the sale without opposition. Where, as here, an operator's existence depends upon his raw material supply, one would not likely pass up a sale unless he knew that a subsequent sale would go to him.

The government has failed to prove that the bidding up of non-conspirators was a part of this combination or conspiracy. However, this allegation is not an essential element to the crime charged.

The requisite element of interstate commerce exists and this court has subject matter jurisdiction over this case. The defendants purchased and manufactured the Forest Service timber with the express intent that the end-products they manufactured would continue in the stream of interstate commerce. *Mandeville Island Farm* v. *American Crystal Sugar*, 334 U.S. 219, 68 S. Ct. 996 (1948).

Therefore, I find the defendants, Champion International Corporation, Young and Morgan, Inc., Bugaboo Timber Company, Freres Lumber Company, Freres Veneer Company, Vernon R. Morgan and Robert T. Freres GUILTY.

This opinion shall constitute findings of fact pursuant to 23(c) Fed. R. Crim. P.

Dated this ___ day of July, 1975.

Robert C. Belloni

ROBERT C. BELLONI

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
	)	No. 75-2866
CHAMPION INTERNATIONAL CORPORATION, Appellants.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
	)	No. 75-2867
YOUNG & MORGAN, INC., and BUGABOO TIMBER CO., et al., Appellants.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 75-2873
FRERES LUMBER CO., INC., FRERES VENEER CO. and ROBERT T. FRERES, Appellants.	)	ORDER

Filed July 20, 1977
Emile E. Melfi, Jr., Clerk
U. S. Court of Appeals

Appeal from the United States District Court
for the District of Oregon

Before: GOODWIN and SNEED, Circuit Judges, and POOLE,* District Judge.

The opinion filed May 3, 1977, in the above-entitled case is amended as follows:

Beginning in the fifth line of the text, in the left-hand column of page 879 of the printed slip sheet, delete everything through the end of the opinion, and substitute the following language:

> Prior inconsistent testimony of a witness before a grand jury is admissible as substantive evidence if the same witness testifies at the trial. Fed. R. Evid. 801(d)(1)(A). The portions read were admissible under a cited rule, even though some of the grand jury testimony had been elicited by means of leading questions. There was no error.
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> The judgments are affirmed.

With the opinion so amended, the panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion as set forth above, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.